

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Sep 21, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ENRIQUE JEVONS, as managing member

of Jevons Properties LLC; JEVONS

PROPERTIES LLC; FREYA K.

BURGSTALLER, as trustee of the Freya

K. Burgstaller Revocable Trust; JAY

GLENN; and KENDRA GLENN,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as

the Governor of the State of Washington;

and ROBERT FERGUSON, in his official

capacity of the Attorney General of the

State of Washington,

Defendants.

No. 1:20-CV-3182-SAB

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court are the parties' cross-Motions for Summary Judgment. ECF Nos. 22, 30. The Court heard oral argument on the motions on August 24, 2021 by videoconference. Richard Stephens appeared by video on behalf of Plaintiffs Enrique Jevons; Jevons Properties, LLC; Freya K. Burgstaller; Jay Glenn; and Kendra Glenn. Cristina Sepe and Brian Rowe appeared by video on

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT . . . \* 1**

1 behalf of Defendants Washington State Governor Jay Inslee and Washington State  
2 Attorney General Robert Ferguson.

3 This action concerns several constitutional challenges to Washington’s  
4 eviction moratorium enacted in response to the COVID-19 pandemic. To mitigate  
5 the spread of COVID-19 and prevent exacerbation of homelessness in the state,  
6 Washington State Governor Jay Inslee issued Proclamation 20-19 on March 18,  
7 2020. The Proclamation and subsequent revisions established a moratorium on  
8 evictions, among other protective health and safety measures. That eviction  
9 moratorium persists—although under new conditions for when landlords and  
10 property managers may pursue evictions and enforcement of rental debt—through  
11 the Governor’s “Bridge Proclamation.”

12 After reviewing the parties’ briefing, oral argument, and the applicable  
13 caselaw, the Court denied Plaintiffs’ Motion for Summary Judgment and granted  
14 Defendants’ Cross-Motion for Summary Judgment at the hearing. Upon reaching  
15 the merits of Plaintiffs’ arguments, the Court held that Washington’s eviction  
16 moratorium does not violate the Takings Clause, Contracts Clause, or Due Process  
17 Clause of the United States Constitution. This Order memorializes the Court’s  
18 ruling.

## 19 I. Facts<sup>1</sup>

### 20 A. The COVID-19 Outbreak and Washington’s Eviction Moratorium

21 On February 29, 2020, Washington State Governor Jay Inslee issued  
22 Proclamation 20-05, declaring a state of emergency in Washington from the  
23 outbreak of novel coronavirus SARS-CoV-2. The SARS-CoV-2 virus causes  
24 coronavirus disease 2019 (“COVID-19”), a highly contagious and potentially fatal  
25 respiratory tract infection. The virus spreads primarily through close interactions  
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27 <sup>1</sup> The following facts are taken from the parties’ respective statements of material  
28 facts and responses thereto. *See* ECF Nos. 23, 31, 38, 41.

1 via respiratory droplets, and there is a lag of several days before the onset of  
2 symptoms. Seniors and persons with preexisting medical conditions are most  
3 vulnerable to complications and death from COVID-19, and statistics indicate that  
4 people of color disproportionately contract and experience severe COVID-19  
5 health outcomes. Without a vaccine or highly effective treatment for COVID-19 at  
6 the time of the outbreak, reducing person-to-person contact through community  
7 mitigation measures was the most effective way of combatting transmission and  
8 ensuring Washington’s healthcare system was not overwhelmed. Accordingly,  
9 Governor Inslee ordered Washingtonians to stay home except for participation in  
10 essential activities and businesses.

11 The Governor’s Office also recognized that the COVID-19 pandemic would  
12 significantly reduce economic output and income, making many tenants unable to  
13 afford rent from the outset of the pandemic. Prior to the outbreak, the state was  
14 facing a homelessness and housing instability crisis. Between 2013 and 2017, over  
15 130,000 adults in Washington faced an eviction, and by 2018, homelessness in the  
16 state reached Great Recession levels. Without countermeasures, the Governor’s  
17 Office anticipated that the COVID-19 pandemic’s economic dislocations would  
18 result in mass evictions, exacerbating housing instability and homelessness in the  
19 state. A rise in evictions, and the lifting of the eviction moratoria generally, are  
20 associated with an increase in COVID-19 infections and deaths. Projections  
21 performed by the University of Washington Institute for Health Metrics and  
22 Evaluation indicated that mass evictions could have resulted in between 18,235 to  
23 59,008 more eviction-attributable COVID-19 cases, 1,172 to 5,623 more  
24 hospitalizations, and 191 to 621 more deaths in the state. Even under lockdown  
25 scenarios, containment of COVID-19 was slower and less effective at reducing the  
26 size of the pandemic when evictions were allowed to continue.

27 The Washington State Department of Health (“DOH”) was particularly  
28 concerned with outbreaks of COVID-19 among persons experiencing housing

1 insecurity and homelessness. As of April 25, 2021, the DOH identified 202  
2 COVID-19 outbreaks in homeless services or shelters. People experiencing  
3 homelessness are typically at increased risk of acquiring COVID-19 due to  
4 crowded living situations. Housing insecure families may find themselves in  
5 shared living conditions, which have been found to increase contact with people  
6 and make compliance with public health guidance difficult. People experiencing  
7 homelessness are also at an increased risk for severe COVID-19, due to a higher  
8 rate of underlying medical conditions and co-morbidities.

9 For the foregoing reasons, Governor Inslee signed Proclamation 20-19 on  
10 March 18, 2020, establishing a temporary moratorium on evictions in Washington.  
11 The Governor issued subsequent proclamations on April 16, 2020 (Proclamation  
12 20-19.1), June 2, 2020 (Proclamation 20-19.2), July 24, 2020 (Proclamation 20-  
13 19.3), October 14, 2020 (Proclamation 20.19-4), December 31, 2020 (Proclamation  
14 20-19.5), and March 18, 2021 (Proclamation 20-19.6), refining the moratorium and  
15 other health and safety measures with each revision. While broadly prohibiting the  
16 commencement of eviction proceedings, the proclamations did not forgive any  
17 debt of unpaid rent and stressed that tenants “who are not materially affected by  
18 COVID-19 should and must continue to pay rent.” Proc. 20-19.6, ¶ 7. The  
19 Governor’s public messaging has also expressly stated that tenants should pay rent  
20 if able and should communicate with landlords. Beginning with Proclamation 20-  
21 19.1, the moratoria also prohibited attempts to collect any such unpaid rent through  
22 withholding of the tenant’s security deposit. *E.g.*, Proc. 20-19.1, ¶ 26. Plaintiffs in  
23 this action primarily challenged the last rendition of the moratorium, Proclamation  
24 20-19.6. Proclamation 20-19.6 ended by its own terms on June 30, 2021, and by  
25 operation of subsequent legislation, which is discussed in the following section. *Id.*  
26 at ¶ 26. The eviction moratorium and attendant provisions are still in effect through  
27 a Bridge Proclamation, however, which is effective until September 30, 2021.

1 Following input from property owners, beginning with Proclamation 29-  
2 19.1, the Governor's Office permitted landlords to treat unpaid rent as an  
3 enforceable debt during the state of emergency, provided that the tenant was  
4 offered, but refused, a reasonable payment plan based on the financial, health, or  
5 other circumstances of the tenant. The exception expressly placed the burden of  
6 proof to enforce rental debt on landlords and property managers. This decision was  
7 made because, in many cases, tenants in genuine economic distress due to the  
8 pandemic were unable to provide adequate proof of their distress. The Governor's  
9 Office reasoned that many tenants have informal employment or non-traditional  
10 sources of income and that, for these tenants, proving distress is not as simple as  
11 submitting a copy of a termination letter from an employer. A tenant who does not  
12 lose their job could be facing pandemic-related economic or health distress  
13 anyway, such as the burden of caring for family members who lost their jobs or  
14 being unable to provide for themselves. The revised moratorium thus placed the  
15 burden of proof on landlords and property managers based on the state's belief that  
16 not all tenants in need of protection were able to submit a declaration of hardship.

17 Overall, during the COVID-19 public health crisis, over 1.6 million  
18 Washingtonians have filed unemployment claims, and the state's unemployment  
19 rate has exceeded its Great Recession peak. Through the first four months of 2021,  
20 over 265,000 new unemployment claims were filed, demonstrating that the job  
21 crisis persisted over a year after COVID-19 emerged. Recent census survey data  
22 reported that 10.7% of renters in Washington (160,342 people) were behind on  
23 their rent, and 17.8% of renters (265,342 people) in Washington reported having  
24 little or no confidence in their ability to pay rent. An analysis by the Aspen  
25 Institute found that 649,000 to 789,000 people in Washington—up to 10.3% of the  
26 state's entire population—would be at risk of eviction without the state's eviction  
27 moratorium. During the pandemic, at least 18,000 more Washingtonians have  
28 relied on cash assistance and 160,000 more on food assistance. The Court also

1 notes that the Eastern District of Washington, which encompasses most of the  
 2 state’s landmass, faces unique and ongoing challenges from the COVID-19  
 3 pandemic. Vaccinations in eastern Washington have lagged behind the rest of the  
 4 state for numerous reasons, including misinformation and lack of accessibility.<sup>2</sup>

5 **B. Senate Bill 5160 and the Housing Stability “Bridge” Proclamation**

6 In April 2021, Senate Bill 5160 (“SB 5160”) was adopted by the  
 7 Washington Legislature and signed into law by Governor Inslee. Engrossed  
 8 Second Substitute S.B. 5160, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* 2021  
 9 Wash. Sess. Laws, ch. 115. The legislation provides tenants certain protections  
 10 during and after the public health emergency. Sections 7 and 8 of SB 5160  
 11 established an eviction resolution pilot program for nonpayment of rent and a right  
 12 to legal representation in eviction cases, respectively. Section 7 also authorized  
 13 landlord access to certain rental assistance programs. While SB 5160 became  
 14 effective on April 22, 2021, localities are still working to implement the rental  
 15 assistance and eviction resolution pilot programs in their jurisdictions. In Yakima  
 16 County, where Plaintiffs are located, both programs are fully operational.

17 Due to the delay in implementation, Governor Inslee issued a housing  
 18 stability “bridge” proclamation on June 29, 2021, which was intended to “bridge  
 19 the operational gap between the eviction moratorium enacted by prior

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 21 <sup>2</sup> Annette Cary, *Tri-Citians Slower Than Others to Get the COVID Vaccine*.  
 22 *What’s the Holdup?*, TRI-CITY HERALD (Apr. 14, 2021 07:43 P.M.),  
 23 <https://www.tri-cityherald.com/news/coronavirus/article250299784.html> (last  
 24 accessed Sept. 20, 2021); Danny Westneat, *The Political Vaccine Divide in*  
 25 *Washington State Is Widening—And COVID Rushes In*, THE SEATTLE TIMES (May  
 26 2, 2021, 1:17 P.M.), [https://www.seattletimes.com/seattle-news/politics/the-](https://www.seattletimes.com/seattle-news/politics/the-political-vaccine-divide-in-washington-state-is-widening-and-covid-rushes-in/)  
 27 [political-vaccine-divide-in-washington-state-is-widening-and-covid-rushes-in/](https://www.seattletimes.com/seattle-news/politics/the-political-vaccine-divide-in-washington-state-is-widening-and-covid-rushes-in/) (last  
 28 accessed Sept. 20, 2021).

1 proclamations and the protections and programs subsequently enacted by the  
2 Legislature.” Proc. 21-09, ¶ 23. With respect to COVID-19-related rent that  
3 accrued from February 29, 2020, the Bridge Proclamation continues to prohibit  
4 eviction proceedings based in part on unpaid rent if the landlord has “no attempt”  
5 to establish a “reasonable repayment plan” with a tenant, as defined by SB 5160, or  
6 the landlord and tenant cannot agree on a plan and no local eviction resolution pilot  
7 program exists per SB 5160. *Id.* at ¶ 31. Further, before a landlord may pursue  
8 eviction proceedings, a tenant must be provided with, and must reject or fail to  
9 respond within 14 days of receipt of, a notice of an opportunity to participate in the  
10 rental assistance program and eviction resolution pilot programs established by  
11 SB 5160. The programs must be operational at the time the notice is sent. *Id.*; ¶ 25.

### 12 **C. Plaintiffs in This Action**

13 Plaintiffs in this action are landlords and property managers in Yakima,  
14 Washington. Plaintiff Enrique Jevons is the managing member of Jevons  
15 Properties, LLC, an entity that owns and rents several hundred residential  
16 properties and also manages rental units for other real property owners. At the time  
17 of Plaintiffs’ filing, Jevons Properties, LLC had 171 tenants who were not current  
18 with their rent. The total amount of rent owed and unpaid to the entity, as of April  
19 2021, was \$266,509.98.

20 Plaintiff Freya K. Burgstaller is the trustee of the Freya K. Burgstaller  
21 Revocable Trust. The Trust owns twelve residential properties in Yakima. In  
22 March 2020, Ms. Burgstaller attempted to evict a tenant who had stopped paying  
23 rent and created enough noise in her unit that a neighboring tenant complained.  
24 During the eviction process, the eviction moratorium came into effect and the  
25 proceedings were halted. Since then, Ms. Burgstaller has been unable to pursue  
26 eviction and the tenant has remained on the property, despite noise complaints.

27 Plaintiffs Jay and Kendra Glenn are owners of forty-six residential rental  
28 properties in Yakima. Most of the Glenns’s rental units are lower-cost units, which

1 cost approximately \$650 and \$750 per month. The average market rate for a one-  
2 bedroom unit in Yakima for fiscal year 2020 was \$769. The total amount due to  
3 the Glens from nonpaying tenants, at the time of filing, was \$99,728.

4 The demand for rental housing in Yakima is high, in part from a shortage of  
5 rental properties. Throughout the moratorium, Plaintiffs have remained subject to  
6 state and local property taxes, in addition to paying utilities, mortgages, and  
7 maintaining and repairing their rental properties. In the personal experience of  
8 several Plaintiffs, tenants are hesitant to provide financial information or details  
9 regarding their health to their landlords, making it difficult to establish reasonable  
10 payment plans for individual tenants. Plaintiffs have not availed themselves of the  
11 SB 5160 programs now operational in Yakima County.

## 12 II. Procedural History

13 Plaintiffs filed the above-captioned lawsuit against Defendants on October  
14 29, 2020, ECF No. 1, and a subsequent Amended Complaint on May 3, 2021,  
15 alleging that Washington's eviction moratorium violated provisions of the  
16 Washington State Constitution and United States Constitution, ECF No 27. They  
17 claimed the moratorium offends the Contracts Clause of the U.S. Constitution;  
18 Takings Clause of the Fifth Amendment to the U.S. Constitution; Takings Clause  
19 of the Washington State Constitution; and Due Process Clause of the Fourteenth  
20 Amendment to the U.S. Constitution. *Id.* Defendants filed an Answer to the  
21 Amended Complaint denying all claims on May 11, 2021. ECF No. 29.

22 Plaintiffs filed their Motion for Summary Judgment on April 30, 2021. ECF  
23 No. 22. Defendants filed their Cross-Motion for Summary Judgment on May 21,  
24 2021. ECF No. 30. The parties also submitted supplemental briefing on the impact  
25 of *Cedar Park Nursery v. Hassid*, \_\_\_ U.S. \_\_\_, 141 S.Ct. 2063 (2021). ECF Nos.  
26 48, 52, 55, 60. The Court heard oral argument on the motions by videoconference  
27 on August 24, 2021.

28 //



### III. Legal Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

In addition to showing there are no questions of material fact, the moving party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of a claim on which the non-moving party has the burden of proof. *Celotex Corp.*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255. Where, as here, parties submit cross-motions for summary judgment, “[e]ach motion must be considered on its own merits.” *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). Accordingly, it is the district court’s duty to “review each cross-motion separately . . . and review the evidence submitted in support of each cross-motion.” *Id.*

#### IV. Discussion

The Court finds, and the parties appear to agree, that no material disputes of fact preclude summary judgment in this matter. The Court thus turns to the merits of the parties' arguments.

##### A. Jurisdiction

###### 1. Whether Plaintiffs' Claims are Moot

Defendants argue that the Court lacks jurisdiction to consider Plaintiffs' claims in this action because they are mooted by cessation of Proclamation 20-19.6, which formally ended on June 30, 2021. Defendants also formerly contended that Plaintiffs lacked Article III standing because their purported injuries were not traceable to the Washington eviction moratorium, as opposed to the federal eviction moratorium.

In contrast, Plaintiffs contend that their claims are not moot because the state eviction moratorium continues—albeit under different conditions—through the Governor's Bridge Proclamation. The heart of their argument is that, because “the inability to treat rent as an enforceable debt for the time period of the [moratorium] continues,” so does their injury and the controversy in this action. ECF No. 37 at 11. With respect to Defendants' standing claim, Plaintiffs previously argued that their injury was directly traceable to Washington's eviction moratorium because the state moratorium was more restrictive than its federal counterpart.

###### a. *Legal Standard*

A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). A party asserting mootness “bears the heavy burden of establishing that there remains no effective relief a court can provide.” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017). “The question is not whether the precise relief sought at the time the case was filed is still available,’ but ‘whether there can

1 be any effective relief.” *Id.* (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1024  
2 (9th Cir. 2015)). Standing and mootness are similar doctrines in some respects:  
3 “Both require some sort of interest in the case, and both go to whether there is a  
4 case or controversy under Article III.” *Jackson v. Calif. Dep’t of Mental Health*,  
5 399 F.3d 1069, 1072 (9th Cir. 2005); *United States v. Sanchez-Gomez*, \_\_\_ U.S.  
6 \_\_\_, 138 S.Ct. 1532, 1537 (2018) (“A case that becomes moot at any point during  
7 the proceedings is ‘no longer a “Case” or “Controversy” for purposes of Article  
8 III,’ and is outside the jurisdiction of the federal courts.”).

9  
10 b. *Discussion*

11 In this case, Plaintiffs’ claims are not moot. The Bridge Proclamation, which  
12 is operational until September 30, 2021, represents a continuation of several  
13 provisions that Plaintiffs allege are unconstitutional. Under the Bridge  
14 Proclamation, eviction proceedings based in part on rent that accrued from  
15 February 29, 2020 are prohibited until the SB 5160 rental assistance and eviction  
16 resolution pilot programs are operational and a landlord has attempted to establish  
17 a reasonable repayment plan with a tenant. Proc. 21-09, ¶¶ 25, 42–45 The tenant  
18 must also be given notice of the opportunity to participate in the programs prior to  
19 eviction. *Id.* at ¶ 25. Further, for rent accruing on August 1, 2021 through  
20 September 30, 2021, the Bridge Proclamation prohibits Plaintiffs from seeking  
21 eviction unless they have presented a reasonable repayment plan to a tenant and  
22 none of the following are applicable: a tenant (1) has made full payment of rent;  
23 (2) has made partial payment of rent based on their individual economic  
24 circumstances, as negotiated with the landlord; (3) has a pending application for  
25 rental assistance; or (4) resides in a jurisdiction in which the rental assistance  
26 program is anticipating receipt of additional resources but has not yet started their  
27 program or the program is not yet accepting new applications for assistance. *Id.* at  
28 ¶ 35. The Bridge Proclamation also continues to limit permissible uses of security  
deposits until landlords and tenants have the opportunity to resolve nonpayment

1 through the SB 5160 programs, and it continues to prohibit the leveraging of fees  
2 for late rent payment during the period of the emergency (from February 29, 2020  
3 to September 30, 2021). *Id.* at ¶¶ 34, 39.

4 These limitations speak to the heart of Plaintiffs’ claims that the moratorium  
5 violates their property rights, contractual rights, and due process rights. Although  
6 the Bridge Proclamation extends the state eviction moratorium under different  
7 conditions, the transition did not moot Plaintiffs’ claims. The precise relief sought  
8 by Plaintiffs is different at this juncture, but the Court could still fashion effective  
9 relief with respect to the Bridge Proclamation. *See Bayer*, 861 F.3d at 862. Because  
10 the Bridge Proclamation extends several actions challenged by Plaintiffs as  
11 unconstitutional, the Court is unable to find that Plaintiffs’ claims are moot by  
12 cessation of Proclamation 20-19.6. Plaintiffs have demonstrated that their claims  
13 are not moot, and the Court has jurisdiction to consider them.

14 In addition, since the parties filed briefs in this matter, the federal eviction  
15 moratorium ended pursuant to the U.S. Supreme Court’s decision to vacate a stay  
16 of enforcement in *Ala. Ass’n of Realtors v. Dep’t of Health and Human Servs.*, 594  
17 U.S. \_\_\_\_, 141 S.Ct. 2320 (2021). Because the federal eviction moratorium is  
18 inoperative, it cannot be the source of Plaintiffs’ injuries in this case and  
19 Defendants’ argument that Plaintiffs lack standing is unpersuasive. For this reason,  
20 Plaintiffs’ purported injury is traceable to the state eviction moratorium and  
21 Plaintiffs have standing.

22 2. Whether Plaintiffs’ Claims Against the Governor are Barred by the Eleventh  
23 Amendment

24 Defendants maintain that the doctrine of sovereign immunity acts as a  
25 jurisdictional bar to Plaintiffs’ claims against Washington State Governor Jay  
26 Inslee. They contend that Governor Inslee does not have a “fairly direct”  
27 connection to enforcement of the eviction moratorium. In contrast, Plaintiffs argue  
28 that Governor Inslee’s enforcement connection is sufficiently direct to overcome

1 sovereign immunity, in part because the Washington State Constitution expressly  
2 provides that the governor “shall see that the laws are faithfully executed.” Wash.  
3 Const. art. III, § 5.

4 a. *Legal Standard*

5 The Eleventh Amendment to the U.S. Constitution acts as a jurisdictional  
6 bar to lawsuits brought by private citizens against state governments absent the  
7 state’s consent. U.S. Const. amend. XI; *Seminole Tribe of Fla. v. Florida*, 517 U.S.  
8 44, 73 (1996); *Sofamor Danek Grp., Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir.  
9 1997). In the seminal case *Ex Parte Young*, 209 U.S. 123 (1908), the U.S. Supreme  
10 Court permitted an action for prospective injunctive relief against state officials  
11 who had a proven connection to enforcing the challenged under the legal “fiction”  
12 that a suit against the individual was not a suit against the state. *Idaho v. Coeur*  
13 *d’Alene Tribe of Idaho*, 521 U.S. 261, 269–270 (1997) (citing *Pennhurst State Sch.*  
14 *and Hosp. v. Halderman*, 465 U.S. 89, 114, n.25 (1984)). To overcome the  
15 protections of sovereign immunity to sue a state official, a plaintiff must  
16 demonstrate that the official “[has] some connection with the enforcement of the  
17 act[.]” *Ex Parte Young*, 209 U.S. at 157. Under the *Young* doctrine, the  
18 enforcement connection “must be fairly direct,” and a “generalized duty to enforce  
19 state law or general supervisory powers over the person responsible for enforcing  
20 the challenged provision” does not suffice. *Los Angeles Cnty. Bar Ass’n v. Eu*, 979  
21 F.2d 697, 704 (9th Cir. 1992).

22 b. *Discussion*

23 In this case, sovereign immunity bars the present suit against Governor  
24 Inslee. Ninth Circuit precedent makes clear that—although a state governor may be  
25 ultimately responsible for executing and enforcing the laws of a state—the duty of  
26 general enforcement does not establish the “requisite enforcement connection” to  
27 overcome sovereign immunity. *Ass’n des Eleveurs de Canards et d’Oies du*  
28 *Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (finding that the California

1 Governor was immune from suit with respect to claims for injunctive relief  
2 because “his only connection to [the relevant statute] [was] his general duty to  
3 enforce California law”), *cert. denied*, 135 S.Ct. 398 (2014); *Nat’l Audubon Soc’y,*  
4 *Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (finding that the “suit is barred  
5 against the Governor . . . as there is no showing that they have the requisite  
6 enforcement connection”), *opinion amended on denial of reh’g*, 312 F.3d 416 (9th  
7 Cir. 2002); *Los Angeles Cnty. Bar Ass’n*, 979 F.2d at 704 (citing *Long v. Van de*  
8 *Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (holding that the “connection must be  
9 fairly direct; a generalized duty to enforce state law or general supervisory power  
10 over the persons responsible for enforcing the challenged provision will not subject  
11 an official to suit”); *see also Nat’l Conf. of Pers. Managers, Inc. v. Brown*, 690 F.  
12 App’x 461, 463 (9th Cir. 2017). “Were the law otherwise, the exception would  
13 always apply[ ]” and “[g]overnors who influence state executive branch policies  
14 (which virtually all governors do) would always be subject to suit under *Ex Parte*  
15 *Young*.” *Tohono O’Odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311 (D. Ariz.  
16 2015). In short, a more direct connection to enforcement of the law is required, and  
17 the Eleventh Amendment bars suit against Governor Inslee. Accordingly,  
18 Governor Inslee is dismissed from this action.

19 Defendants do not appear to challenge whether Attorney General Ferguson  
20 is properly named in this suit, and the Court agrees sovereign immunity is not a  
21 jurisdictional bar as to the Attorney General. *Cf. Planned Parenthood of Idaho,*  
22 *Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004) (holding that the Idaho Attorney  
23 General was properly named under *Ex Parte Young* because, unless the county  
24 prosecutor objected, the Attorney General had power to perform every act the  
25 county attorney could perform); *Bolbol v. Brown*, 120 F. Supp. 3d 1010, 1018–19  
26 (N.D. Cal. 2015) (holding that the California Attorney General was not entitled to  
27 Eleventh Amendment immunity because under the state constitution the Attorney  
28 General not only has “direct supervision over every district attorney” but also has

1 the duty to “prosecute any violations of the law ... [and] shall have all the powers  
2 of a district attorney”).

3 3. Whether the Court Has Jurisdiction to Enjoin Purported Violations of the  
4 Washington Constitution

5 The parties now agree that the Court lacks jurisdiction to enjoin purported  
6 violations of the Washington Constitution. *See* ECF No. 37 at 14. As a result, the  
7 Court dismisses Plaintiffs’ Third Claim for Relief on the grounds of state sovereign  
8 immunity and federalism, as embodied in the Eleventh Amendment.

9 **B. First Cause of Action: Contracts Clause of Article I, § 10 of the U.S.**  
10 **Constitution**

11 1. Whether the Eviction Moratorium Violates the Contracts Clause

12 Of their substantive claims, Plaintiffs first argue that Washington’s eviction  
13 moratorium violates the Contracts Clause of Article I, § 10 of the U.S.  
14 Constitution. Plaintiffs argue that the eviction moratorium violates the Contracts  
15 Clause because it substantially impairs their landlord-tenant contracts. They  
16 contend that the ability to evict is the “cornerstone” of their contractual bargain and  
17 the moratorium eliminates all practical remedies for contractual violations. ECF  
18 No. 22 at 23. Plaintiffs cite mostly pre-*Blaisdell* decisions, including *Bronson v.*  
19 *Kinzie*, 42 U.S. 311 (1843), for the principle that a contractual impairment may be  
20 substantial even when remedies for contractual breaches are merely delayed. ECF  
21 No. 22 at 24; *see generally Home Building & Loan Association v. Blaisdell*, 290  
22 U.S. 398 (1934). Plaintiffs further assert that the moratorium is not a reasonable  
23 and necessary means to address Washington’s stated interest. ECF No. 22 at 27.  
24 Their primary contention is that, because the moratorium protects *all* renters and  
25 there is no requirement that a renter attest to loss of income or health impacts from  
26 the COVID-19 pandemic, the moratorium is not sufficiently tailored to  
27 Defendants’ purpose. *Id.* at 24–25.

1 In contrast, Defendants argue that the moratorium does not impose a  
2 substantial, unforeseeable impairment on Plaintiffs’ rental agreements. ECF No. 30  
3 at 43–48. Specifically, Defendants claim that the eviction moratorium does not  
4 undermine Plaintiffs’ contractual bargain or impair Plaintiffs’ reasonable  
5 expectations, and also that Plaintiffs may safeguard or reinstate their contractual  
6 rights. *Id.* Defendants respond that the means of the moratorium is appropriate  
7 because it was intended to have broad public benefits, including protection of the  
8 state’s economy and public health. ECF No. 30 at 50–51, 53. Defendants chiefly  
9 cite *Blaisdell* in support of the contention that the moratorium fits the Supreme  
10 Court’s standard for a reasonable and appropriate law, especially during a period of  
11 emergency. *See id.* at 53.

12 a. *Legal Standard*

13 The Contracts Clause provides that “[n]o State shall . . . pass any . . . Law  
14 impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1. Yet, the  
15 Contracts Clause is not “the Draconian provision that its words might seem to  
16 imply.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978). Modern  
17 Contracts Clause jurisprudence is based on the “watershed decision” of *Home*  
18 *Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934). *Apartment Ass’n of*  
19 *Los Angeles Cnty., Inc. v. City of Los Angeles*, \_\_ F.4th \_\_, No. 20-56251, 2021  
20 WL 3745777, at \*5 (9th Cir. Aug. 25, 2021). In the case of *Blaisdell*, the U.S.  
21 Supreme Court “upheld Minnesota’s statutory moratorium against home  
22 foreclosures, in part, because the legislation was addressed to the ‘legitimate end’  
23 of protecting ‘a basic interest of society.’” *Keystone Bituminous Coal Ass’n v.*  
24 *DeBenedictis*, 480 U.S. 470, 503 (1987). Pertinent Contract Clauses cases consist  
25 of *Blaisdell* and its progeny, which conceptualize a radically different idea of the  
26 Clause than in pre-*Blaisdell* jurisprudence. Post-*Blaisdell*, “the Supreme Court has  
27 construed [the Contracts Clause] prohibition narrowly in order to ensure that local  
28 governments retain the flexibility to exercise their police powers effectively.”



1 *Matsuda v. Cty. & Cnty. of Honolulu*, 512 F.3d 1148, 1152 (9th Cir. 2008); *Allied*  
2 *Structural Steel Co.*, 438 U.S. at 240 (“[T]he [state’s] police power[ ] is an exercise  
3 of the sovereign right of the Government to protect the lives, health, morals,  
4 comfort and general welfare of the people, and is paramount to any rights under  
5 contracts between individuals.”) (quoting *Manigault v. Springs*, 199 U.S. 473, 480  
6 (1905)).

7 To determine whether legislation violates the Contracts Clause, federal  
8 courts deploy a “two-step test.” *Sveen v. Melin*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1815, 1821–  
9 22 (2018). First, “[t]he threshold issue is whether the state law has ‘operated as a  
10 substantial impairment of a contractual relationship.’” *Id.* (quoting *Allied*  
11 *Structural Steel Co.*, 438 U.S. at 244). Under this inquiry, relevant factors include  
12 “the extent to which the law undermines the contractual bargain, interferes with a  
13 party’s reasonable expectations, and prevents the party from safeguarding or  
14 reinstating his rights.” *Id.* at 1822. Second, if the law constitutes a substantial  
15 impairment of a contractual relationship, the court must turn to the “means and  
16 ends of the legislation.” *Id.* The court should determine whether the legislation is  
17 drawn in an “‘appropriate’ and ‘reasonable’ way to advance ‘a significant and  
18 legitimate public purpose.’” *Id.* (quoting *Energy Reserves Grp., Inc. v. Kansas*  
19 *Power & Light Co.*, 459 U.S. 400, 411–412 (1983)). Under this second step, courts  
20 apply a heightened level of scrutiny when the government is a contracting party.  
21 *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977). When the  
22 government is not party to the contract being impaired, as is here, “courts properly  
23 defer to legislative judgment as to the necessity and reasonableness of a particular  
24 measure.” *Energy Reserves*, 459 U.S. at 413 (quotations omitted); *see also*  
25 *Keystone Bituminous*, 480 U.S. at 505; *Apartment Ass’n of Los Angeles Cnty.*,  
26 2021 WL 3745777 at \*5; *Lazar v. Kroncke*, 862 F.3d 1186, 1199 (9th Cir. 2017).

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28 //

1  
2 b. *Discussion*

3 In this case, there is no dispute that Plaintiffs have valid landlord-tenant  
4 agreements that are subject to the Contracts Clause. Accordingly, the Court turns  
5 to the two-step test re-articulated in *Sveen*.

6 i. Substantial Impairment

7 The Court finds that Washington's eviction moratorium does not  
8 substantially impair Plaintiffs' lease agreements for three reasons. First, the  
9 moratorium does not undermine Plaintiffs' contractual bargain with their tenants.  
10 The moratorium delays the ability of Plaintiffs to exercise certain statutory  
11 remedies. Mere delay is insufficient to materially alter the lease agreements in a  
12 manner that violates the Contracts Clause. *Blaisdell* is a strikingly similar case that  
13 is directly applicable. 290 U.S. 398 (1934). In *Blaisdell*, the U.S. Supreme Court  
14 upheld a Depression-era mortgage moratorium law extending mortgagors'  
15 redemption period for up to two years. *Id.* at 439. It reasoned that while contractual  
16 obligations may be "impaired by a law which renders them *invalid, or releases or*  
17 *extinguishes* them[,]” such as a “state insolvent law” that wholly “discharge[s] the  
18 debtor from liability” for preexisting debts, the mortgage moratorium did not  
19 impose an impairment on the plaintiffs' contractual rights. *Id.* at 439 (emphasis  
20 added). In that case, the U.S. Supreme Court also distinguished the case cited by  
21 Plaintiffs, reasoning that the Court in *Bronson* did not consider states' interests in  
22 exercising police powers to “safeguard the vital interests of its people.” *Id.* at 434.  
23 Indeed, the *Blaisdell* Court made clear that changing socioeconomic circumstances  
24 may alter the boundaries of the state's police power. *Id.* at 442.

25 In this case, the eviction moratorium does not extinguish the contractual  
26 obligations of tenants to landlords, but temporarily restrains enforcement through  
27 eviction and debt collection during a period of “great public calamity.” *Id.* The  
28 moratorium is only a “temporary restraint of enforcement . . . to protect the vital  
interests of the community”—that is, protecting the public from a homelessness

1 epidemic unseen since the Great Recession and preventing further transmission of  
2 COVID-19. *See id.* at 439. The moratorium’s plain language does not extinguish or  
3 release tenants’ obligations to pay past-due rent. The moratorium delays the  
4 remedy of eviction for failure of a tenant to pay *timely* rent during the period of the  
5 health-emergency-based restriction. It is also significant to note that Proclamation  
6 20-19.6 expressly provided that landlords and property managers had the right to  
7 treat unpaid rent as enforceable debt immediately if they “demonstrate[d] . . . to a  
8 court that the resident was offered, and refused or failed to comply with” a  
9 reasonable payment plan. Proc. 20-19.6, ¶ 35. Under the active Bridge  
10 Proclamation, past-due rent may be treated as an enforceable debt once a  
11 repayment plan has been offered, the SB 5160 programs are implemented, and a  
12 tenant has been offered, and rejected or failed to respond to, an opportunity to  
13 participate in the programs. In Yakima, the SB 5160 programs are fully operational  
14 and Plaintiffs may treat unpaid rent or other charges as an enforceable debt that is  
15 owing and collectible after following these procedures. In either scenario, as a  
16 matter of law, Plaintiffs are incorrect in their assertion that the moratorium  
17 prohibits them “from treating unpaid rent as an enforceable debt and bringing a  
18 breach-of-contract action.” ECF No. 22 at 28.

19 Second, the eviction moratorium does not impair reasonable expectations of  
20 Plaintiffs in their contracts. Under this factor, courts consider “whether the industry  
21 the complaining party has entered has been regulated in the past.” *Energy Rsrvs.*  
22 *Grp., Inc.*, 459 U.S. at 411–12. The landlord-tenant relationship, and housing  
23 industry generally, is heavily regulated in Washington. The Residential Landlord-  
24 Tenant Act, Chapter 59.18 RCW, regulates the relationship by, *inter alia*,  
25 establishing a duty to keep the premises fit for human habitation, Wash. Rev. Code  
26 § 59.18.060; requiring notice of rent increases, *id.* § 59.18.140, and termination, *id.*  
27 § 59.18.200; and regulating late fees, *id.* § 59.18.170, tenant screenings, *id.*  
28 § 59.18.257, and security deposits, *id.* § 59.18.260–.280. Significantly, Chapter

1 59.12 RCW (Forcible Entry and Forcible and Unlawful Detainer), and the  
2 Residential Landlord-Tenant Act, both regulate when eviction of tenants is  
3 permissible. Wash. Rev. Code §§ 59.12, 59.18.365–.410. In this case, the State’s  
4 pervasive regulation in this field has placed Plaintiffs on notice that they may face  
5 further government intervention. That is particularly true where, as here, the  
6 eviction moratorium regulates the same industry topics (permissible use of  
7 unlawful detainer proceedings, late fees, and security deposits) and shares the same  
8 legislative intent to protect the rights of tenants in the rental relationship.  
9 Consequently, this factor also indicates that the eviction moratorium does not  
10 violate the Contracts Clause.

11 Third, Plaintiffs may safeguard and reinstate their contractual rights during  
12 and subsequent to the eviction moratorium. A law altering contractual remedies  
13 without nullifying them does not “prevent[] the party from safeguarding or  
14 reinstating [their] rights.” *Sveen*, 138 S. Ct. at 1822. As delineated previously, the  
15 eviction moratorium did not extinguish Plaintiffs’ contractual rights. Put bluntly,  
16 the moratorium delays the use of particular tools to enforce certain contractual  
17 obligations for the time of the state of emergency. The eviction moratorium does  
18 not eliminate tenants’ obligations to pay rent or Plaintiffs’ rights to collect past-due  
19 rent. And contrary to Plaintiffs’ representations, Plaintiffs may treat unpaid rent as  
20 an enforceable debt during the moratorium after following the above-noted  
21 procedures. Because the moratorium does not nullify contractual remedies, the  
22 eviction moratorium does not impair Plaintiffs’ ability to safeguard their  
23 contractual rights in their rental agreements.

24 Due to the foregoing, the Court finds that the eviction moratorium does not  
25 substantially impair Plaintiffs’ lease agreements. Even if the Court were to find  
26 that the moratorium operated to substantially impair Plaintiffs’ contractual rights,  
27 Plaintiffs’ Contracts Clause claim fails because the eviction moratorium advances  
28

1 a significant and legitimate public purpose in an appropriate and reasonable way.

2 Each element is discussed in turn.

3 ii. Significant and Legitimate Purpose Public

4 Each of Washington’s proffered reasons for the eviction moratorium are  
5 significant and legitimate public objectives. On its face, Proclamation 20-19.6  
6 states that its purpose is to “reduce economic hardship” of those “unable to pay  
7 rent as a result of the COVID-19 pandemic” and “promote public health and safety  
8 by reducing the progression of COVID-19 in Washington State.” Proc. 20-19.6, ¶¶  
9 13, 15. The Bridge Proclamation extends this purpose with the goal of “reduc[ing]  
10 uncertainty” as the state implements a long-term post-COVID-19 housing recovery  
11 strategy. Proc. 21-09, ¶ 23.

12 Here, the state’s purpose of preventing transmission of COVID-19 is not  
13 only significant and legitimate, but compelling. *See, e.g., Roman Catholic Diocese*  
14 *of Brooklyn v. Cuomo*, \_\_ U.S. \_\_, 141 S. Ct. 63, 67 (2020) (per curiam)  
15 (“Stemming the spread of COVID–19 is unquestionably a compelling  
16 interest . . . .”); *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 353 (4th  
17 Cir. 2011) (“[T]he state’s wish to prevent the spread of communicable diseases  
18 clearly constitutes a compelling interest.”). The eviction moratorium also seeks to  
19 address the economic and social fallout from the gravest public health crisis in a  
20 century. The Governor’s Office was particularly concerned with the impact of  
21 COVID-19, and all its economic consequences, on housing and the homelessness  
22 crisis. It cannot seriously be argued that these objectives do not serve the public  
23 and that they do not constitute significant and legitimate purposes of the state.  
24 Consequently, the Court finds that Defendants have articulated a significant and  
25 legitimate public purpose for the eviction moratorium.

26 iii. Appropriate and Reasonable Means

27 The eviction moratorium is also an appropriate and reasonable measure to  
28 address the state’s objectives. Since Washington is not a party to the contracts

1 under review, the Court must “defer” to the government’s “judgment as to the  
2 necessity and reasonableness of a particular measure.” *Energy Rsrvs. Grp.*, 459  
3 U.S. at 412–13. Such “latitude ‘must be especially broad’ where ‘officials  
4 ‘undertake to act in areas fraught with medical and scientific uncertainties,’ such  
5 as responding to the COVID-19 pandemic. *S. Bay United Pentecostal Church v.*  
6 *Newsom*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)  
7 (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Provided that the  
8 limits of the Contracts Clause are not exceeded, the Court should decline to engage  
9 in second-guessing, as the “unelected federal judiciary” lacks the “background,  
10 competence, and expertise to assess public health.” *Id.* (quoting *Garcia v. San*  
11 *Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

12 On this point, Plaintiffs argue that the moratorium is not reasonable and  
13 appropriate because it applies “regardless of a tenant’s employment or ability to  
14 pay.” ECF No. 22 at 18. This argument misses the forest for the trees. Regardless  
15 of the pandemic’s impact on any specific individual’s financial or health  
16 circumstances, one of the moratorium’s express intentions is to reduce person-to-  
17 person contact to mitigate transmission of COVID-19. At least one study’s  
18 projections indicated that mass evictions could have resulted in up to 59,008 more  
19 eviction-attributable COVID-19 cases, 5,623 more hospitalizations, and 621 more  
20 deaths in Washington. ECF No. 35-1 at 64–65. Further, the reasonableness of the  
21 state’s public purpose of preventing homelessness during the pandemic is directly  
22 supported by *Blaisdell*, where the Supreme Court upheld a similar law enacted  
23 during an “emergency” that “threaten[ed] the loss of homes.” 290 U.S. at 444–45.

24 Plaintiffs also maintain that the eviction moratorium places an unreasonable  
25 burden of its public benefit on landlords and property managers. But virtually  
26 every law “regulating commercial and other human affairs . . . creates burdens for  
27 some that directly benefit others.” *Connolly v. Pension Benefit Guar. Corp.*, 475  
28 U.S. 211, 223 (1986). Simply because the moratorium “requires one person to use

1 his or her assets for the benefit of another” does not raise the eviction moratorium  
2 to a level of unconstitutionality under the Contracts Clause. *Id.* It does not serve  
3 special interests but seeks to protect the basic interest of society in preventing mass  
4 evictions and housing instability, *id.*, and preventing the further spread of COVID-  
5 19.

6 For all these reasons, and in accordance with the numerous other district  
7 courts that have considered constitutional challenges to state eviction moratoria,  
8 the Court finds that Washington’s moratorium is an appropriate and reasonable  
9 response to the state’s significant and legitimate public purpose of preventing  
10 spread of COVID-19 and exacerbation of the homelessness crisis. *See, e.g.*,  
11 *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 355 (E.D. Pa. 2020) (finding  
12 that “as in *Blaisdell*, where temporary measures enacted in response to emergency  
13 conditions to allow people to remain in their homes under certain conditions was  
14 upheld in response to a Contracts Clause challenge, [plaintiff’s] Contracts Clause  
15 challenge to the City’s temporary legislation, enacted in response the COVID-19  
16 pandemic and designed to allow residents to remain in their homes, is unlikely to  
17 succeed on the merits”); *El Papel LLC v. Inslee*, No. 2:20-CV-01323-RAJ-JRC,  
18 2020 WL 8024348, at \*7 (W.D. Wash. Dec. 2, 2020), *report and recommendation*  
19 *adopted*, No. 2:20-CV-01323-RAJ-JRC, 2021 WL 71678 (W.D. Wash. Jan. 8,  
20 2021) (“*Blaisdell* supports the reasonableness of [Washington’s Moratorium].”).  
21 The Court declines to second-guess the expertise of the state in formulating an  
22 appropriate response to the present public health emergency, which is fraught with  
23 medical and scientific uncertainties. Accordingly, Defendants are entitled to  
24 judgment as a matter of law and the Court grants summary judgment in favor of  
25 Defendants on the Contracts Clause claim.

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1 **C. Second Cause of Action: Takings Clause of the Fifth Amendment to the**  
2 **U.S. Constitution**

3 Plaintiffs’ next cause of action contends that the eviction moratorium  
4 constitutes a *per se* physical taking of their property rights under the Fifth  
5 Amendment to the U.S. Constitution. Plaintiffs do not request monetary damages  
6 in this action. Instead, they request the Court grant declaratory relief that a “taking”  
7 has occurred, so that they may begin the process to acquire “just compensation.”  
8 Their core Takings Clause claim is that the eviction moratorium leads to a physical  
9 invasion of private property and thereby “takes” Plaintiffs’ right to exclude. ECF  
10 No. 22 at 6–11. They cite *Cedar Point Nursery v. Hassid*, \_\_\_ U.S. \_\_\_, 141 S. Ct.  
11 2063 (2021) to support their assertion that the moratorium constitutes a physical  
12 taking. ECF No. 48 at 2–9. Plaintiffs also argue that the eviction moratorium  
13 amounts to a *per se* taking because it appropriates their property rights in their  
14 rental contracts and security deposits. *Id.* at 11–12.

15 Defendants argue that the eviction moratorium is not a *per se* taking because  
16 the state has not physically invaded Plaintiffs’ properties or otherwise appropriated  
17 their property rights. They contend that *Cedar Point Nursery* is factually and  
18 legally distinguishable and the case actually reaffirms the U.S. Supreme Court’s  
19 prior holdings that regulations restricting the use of property without a physical  
20 invasion of land, particularly when the use is premised on the owner’s voluntary  
21 invitation to an occupant, are not *per se* takings. ECF No. 56 at 2–5. Defendants  
22 also claim that the U.S. Supreme Court’s *per se* takings jurisprudence does not  
23 apply to property interests in contracts, and nonetheless, the eviction moratorium  
24 appropriated neither Plaintiffs’ contractual rights nor security deposits. ECF No. 30  
25 at 36–38.

26 //  
27 //  
28 //



1           1.     Whether Declaratory Relief is Available to Plaintiffs

2                           a. *Legal Standard*

3           The Takings Clause prohibits a state from taking private property for public  
4 use “without just compensation.” U.S. Const. amend. V. Accordingly, “[e]quitable  
5 relief is not available to enjoin an alleged taking of private property for public  
6 use . . . when a suit for compensation can be brought against the sovereign  
7 subsequent to the taking.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016  
8 (1984) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682  
9 (1949)); accord *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*,  
10 560 U.S. 702, 740 (2010) (Kennedy, J., concurring). The U.S. Supreme Court  
11 reasoned in *Knick v. Township of Scott, Pa.*, 588 U.S. \_\_\_, 139 S. Ct. 2162 (2019)  
12 that, “[t]oday, because the federal and nearly all state governments provide just  
13 compensation remedies to property owners who have suffered a taking, equitable  
14 relief is generally unavailable. As long as an adequate provision for obtaining just  
15 compensation exists, there is no basis to enjoin the government’s action effecting a  
16 taking.” *Id.* at 2176–77. The Court concluded that “a government violates the  
17 Takings Clause when it takes property without compensation, and that a property  
18 owner may bring a Fifth Amendment claim under [42 U.S.C.] § 1983 at that time.”  
19 *Id.* at 2177.

20                           b. *Discussion*

21           The Court first considers whether the declaratory relief sought is available to  
22 Plaintiffs. In this case, Plaintiffs do not seek proper relief for a Fifth Amendment  
23 taking. Plaintiffs seek declaratory relief that a taking has occurred, not monetary  
24 damages. As other federal district courts have found, such relief is inappropriate  
25 because it would be the functional equivalent of an injunction against enforcement  
26 of the moratorium. *See, e.g., Baptise v. Kennealy*, 490 F. Supp. 3d 353, 391 (D.  
27 Mass. 2020); *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 2769105, \*4  
28 (W.D. Pa. May 28, 2020); *HAPCO*, 482 F. Supp. 3d at 358, 358 n.112. The

1 declaratory judgment sought by Plaintiffs is indisputably a type of equitable  
2 remedy. *Apache Survival Coalition v. United States*, 21 F.3d 895, 905 n.12 (9th  
3 Cir. 1994). Accordingly, the relief sought by Plaintiffs is foreclosed by the  
4 Supreme Court’s decision in *Knick*, 139 S. Ct. at 2177. The remedy for a taking  
5 under the Fifth Amendment is damages, not equitable relief.<sup>3</sup> For this reason, the  
6 Court is unable to grant the relief sought by Plaintiffs.

7 2. Whether the Eviction Moratorium Constitutes a *Per Se* Physical Taking

8 a. *Legal Standard*

9 The Fifth Amendment’s Takings Clause applies to the states through the  
10 Fourteenth Amendment. *Murr v. Wisconsin*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1933, 1942  
11 (2017); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). As previously  
12 stated, the Fifth Amendment provides that private property shall not “be taken for  
13 public use, without just compensation.” U.S. Const. amend. V. Under the Takings  
14 Clause, there are traditionally two categories of takings, (1) *per se* physical takings,  
15 and (2) regulatory takings. To summarize:

16 Our jurisprudence involving condemnations and physical takings is as  
17 old as the Republic and, for the most part, involves the straightforward  
18 application of *per se* rules. Our regulatory takings jurisprudence, in  
19 contrast, is of more recent vintage and is characterized by ‘essentially  
ad hoc, factual inquiries,’ designed to allow ‘careful examination and  
weighing of all the relevant circumstances.’”

20 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302,  
21 321 (2002) (internal citations omitted). “The first category of cases requires courts  
22 to apply a clear rule; the second necessarily entails complex factual assessments of  
23 the purposes and economic effects of government actions.” *Yee v. Escondido*, 503

24 \_\_\_\_\_  
25 <sup>3</sup> It is worth noting that the Washington State Constitution provides an avenue for  
26 obtaining compensation via damages for the alleged taking of property. Wash.  
27 Const. art. I, § 16. Plaintiffs have not attempted to acquire just compensation for  
28 the purported taking through available state procedures.

1 U.S. 519, 523 (1992). “This longstanding distinction between acquisitions of  
2 property for public use, on the one hand, and regulations prohibiting private uses,  
3 on the other, makes it inappropriate to treat cases involving physical takings as  
4 controlling precedents for the evaluation of a claim that there has been a  
5 ‘regulatory taking,’ and vice versa.” *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at  
6 322.

7 Under the first category of *per se* physical takings, “[w]hen the government  
8 physically takes possession of an interest in property for some public purpose, it  
9 has a categorical duty to compensate the former owner, regardless of whether the  
10 interest that is taken constitutes an entire parcel or merely a part thereof. Thus,  
11 compensation is mandated when a leasehold is taken and the government occupies  
12 the property for its own purposes, even though that use is temporary.” *Id.* The U.S.  
13 Supreme Court acknowledged that the same was true when the government  
14 physically appropriated part of a rooftop to provide cable TV access for apartment  
15 tenants in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982),  
16 and where the government used its planes in private airspace to approach a  
17 government airport in *United States v. Causby*, 328 U.S. 256 (1946). *Tahoe-Sierra*  
18 *Pres. Council, Inc.*, 535 U.S. at 322.

19 Under the second category of regulatory takings, which contrasts with the  
20 categorical *per se* takings rule, courts consider complex factual assessments of the  
21 purposes and economic effects of governmental actions. *Id.* at 323 (quoting *Yee*,  
22 503 U.S. at 523). The seminal regulatory takings case is *Penn Central Transp. Co.*  
23 *v. City of New York*, 439 U.S. 883 (1978). Plaintiffs do not challenge the  
24 moratorium as a regulatory taking and, for this reason, the Court does not  
25 extrapolate the *Penn Central* standard here. *Accord Yee*, 503 U.S. at 536–37.

26 In *Loretto*, a *per se* takings case, the U.S. Supreme Court considered a  
27 challenge to a New York statute requiring that landlords permit a cable television  
28 company to install television facilities on their properties, and which prohibited

1 demands for payment from the company in excess of an amount determined  
2 reasonable by the state commission. *Loretto*, 458 U.S. at 423. The petitioner  
3 brought a class action for damages, alleging that the statute constituted a taking. *Id.*  
4 The question for the U.S. Supreme Court was “whether an otherwise valid  
5 regulation so frustrates property rights that compensation must be paid.” *Id.* at  
6 425–26 (citing *Penn. Central Transp. Co.*, 439 U.S. at 127–28). The U.S. Supreme  
7 Court’s decision hinged firmly on its interpretation of the third *Penn Central*  
8 factor, which considers the “character” of the governmental action. *Id.* at 429–430.  
9 The Court concluded that “a permanent physical occupation authorized by  
10 government is a taking without regard to the public interests that it may serve,” *id.*  
11 at 426, and that there was invariably a taking because the statute mandated the  
12 permanent physical occupation of real property, *id.* at 427. The Court’s reasoning  
13 relied heavily on the distinction between a permanent occupation and temporary  
14 physical invasion. *Id.* at 434 (citing *PruneYard Shopping Center v. Robins*, 447  
15 U.S. 74 (1980)). While a temporary physical invasion is subject to a balancing  
16 process under the three *Penn Central* factors, “when the ‘character of the  
17 governmental action[ ]’ is a permanent physical occupation of property, our cases  
18 uniformly have found a taking to the extent of the occupation, without regard to  
19 whether the action achieves an important public benefit or has only minimal  
20 economic impact on the owner.” *Id.* at 434–35 (internal citation omitted). Thus, the  
21 Court held in *Loretto* that “permanent physical invasions” are *not* subject to  
22 balancing under the remaining *Penn Central* factors and are instead *per se* takings.

23         Subsequent to *Loretto*, the U.S. Supreme Court decided *Yee v. City of*  
24 *Escondido, California*, 503 U.S. 519 (1992). The petitioners in *Yee* were mobile  
25 home park owners in Escondido, California, who rented pads of land to mobile  
26 homeowners. *Id.* at 523. California’s Mobilehome Residency Law limited the  
27 reasons that a park owner could terminate a mobile homeowner’s tenancy to (1)  
28 nonpayment of rent; and (2) the park owner’s desire to change the use of his or her

1 land. *Id.* at 524. The City also had a rental control ordinance that prohibited rent  
2 increases absent the City Council’s approval. *Id.* at 524–25. Petitioners argued that  
3 the local rent ordinance, in conjunction with the Mobilehome Residency Law,  
4 amounted to a *per se* physical taking. *Id.* at 523–24. The U.S. Supreme Court held  
5 that the rent control ordinance did not authorize an unwanted physical occupation  
6 of petitioners’ property and therefore did not amount to a *per se* taking. *Id.* at 532.  
7 The Court rejected petitioners’ argument that the rental control ordinance  
8 authorized a physical taking because the law, in conjunction with the state law’s  
9 restrictions, granted a homeowner a right to occupy the pad indefinitely at a  
10 submarket rent. In rejecting this argument, the Court reasoned that a physical  
11 taking occurs “only when [the government] *requires* the landowner to submit to  
12 physical occupation of his land.” *Id.* at 527 (emphasis in original). The petitioners  
13 were not compelled by the city or state to continue renting their properties. *Id.* The  
14 Court determined that, because the laws merely regulated petitioners’ *use* of their  
15 land by regulating the relationship between landlord and tenant, they could not be  
16 squared with the Court’s physical takings cases. *Id.* at 527–28. The U.S. Supreme  
17 Court concluded: “This Court has consistently affirmed that States have broad  
18 power to regulate housing conditions in general and the landlord-tenant  
19 relationship in particular without paying compensation for all economic injuries  
20 that such regulation entails.” *Id.* at 528–29 (quoting *Loretto*, 458 U.S. at 440);  
21 *Florida Power Corp.*, 480 U.S. at 252 (“[S]tatutes regulating the economic  
22 relations of landlords and tenants are not *per se* takings.”).

23 The U.S. Supreme Court issued a more recent decision concerning the  
24 Takings Clause in *Cedar Point Nursery v. Hassid*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 2063  
25 (2021). In *Cedar Point Nursery*, the Court held that a California access regulation  
26 that gave outside labor organizers a right to “take access” to agricultural  
27 employers’ property was a *per se* physical taking because it appropriated property  
28 owners’ “right to exclude,” both for the government itself and for third parties. *Id.*

1 at 2072 (quoting Cal. Code. Regs., tit. 8, § 20900(e)(1)(C) (2020)). The regulation  
2 required agricultural employers to permit union organizers on their property for  
3 three hours a day, 120 days per year, for the purpose of soliciting employees to join  
4 or form a union. *Id.* at 2069. The Court reasoned that the occupation was a physical  
5 taking because it impacted the right to exclude, which is the “sine qua non” of  
6 property. *Id.* at 2072–73. The Court rejected the notion that the failure of the  
7 regulation to invade the property right “around the clock” made the taking any less  
8 a taking under the Fifth Amendment. *Id.* at 2075. Through *Cedar Point Nursery*, it  
9 appears the Court implicitly overruled its previous rationale under *per se*  
10 jurisprudence that distinguished between “permanent physical occupations” and  
11 “temporary physical invasions.” See *Loretto*, 458 U.S. at 434 (citing *PruneYard*  
12 *Shopping Center*, 447 U.S. at 74).

13 b. *Discussion*

14 Even if the Court were to find that declaratory relief was available to  
15 Plaintiffs, the Court finds that Washington’s eviction moratorium does not  
16 constitute a *per se* physical taking under the Takings Clause. With respect to  
17 Plaintiffs’ assertion regarding physical occupation, the moratorium does not  
18 constitute a *per se* taking because the moratorium did not require Plaintiffs to  
19 submit to physical occupation or invasion of their land and did not appropriate  
20 Plaintiffs’ right to exclude. The U.S. Supreme Court has made clear that “statutes  
21 regulating the economic relations of landlords and tenants are not *per se* takings.”  
22 *Florida Power Corp.*, 480 U.S. at 252. No physical invasion has occurred beyond  
23 that agreed to by Plaintiffs in renting their properties as residential homes, which is  
24 naturally subject to regulation by the state. Like traditional regulatory takings  
25 cases, the moratorium “transfers wealth from the landlord to the tenants by  
26 reducing the landlords’ income and the tenants’ monthly payments.” *Yee*, 503 U.S.  
27 at 529. But, as the Supreme Court stated in *Yee*, the existence of the wealth transfer  
28 “in itself does not convert regulation into physical invasion.” *Id.* at 530. To find

1 that the eviction moratorium is a *per se* physical taking would require the Court to  
2 disregard the U.S. Supreme Court’s holdings and rationale in both *Loretto* and *Yee*;  
3 it would essentially require the Court to eliminate the line between the U.S.  
4 Supreme Court’s *per se* takings and regulatory takings jurisprudence. Such  
5 activism is not the occupation of this Court.

6 Plaintiffs’ attempt to distinguish *Yee* from this case fails, as the plaintiffs in  
7 *Yee* similarly argued that the ordinance required them to lease to tenants beyond  
8 their original lease terms. 503 U.S. at 526–27 (“Because under the California  
9 Mobilehome Residency Law the park owner cannot evict a mobile home owner or  
10 easily convert the property to other uses, the argument goes, the mobile home  
11 owner is effectively a perpetual tenant of the park. . . .”). In this case, just as in *Yee*,  
12 Plaintiffs voluntarily invited tenants to occupy their properties as residential  
13 homes. The state has not required any physical invasion and their tenants were “not  
14 forced upon them by the government.” *Id.* at 528. Plaintiffs’ right to exclude has  
15 not been taken because the moratorium compelled no physical invasion or  
16 occupation that Plaintiffs would have forfeited in the first place. *See id.* at 532–33.  
17 Instead, the eviction moratorium regulates the landlord-tenant relationship once it  
18 is already established.

19 *Cedar Point Nursery* also does not disturb the Court’s analysis. The  
20 California access regulation challenged in *Cedar Point Nursery* is distinguishable  
21 from the eviction moratorium in this case. Unlike the physical appropriation of the  
22 right to exclude in *Cedar Point Nursery*, the moratorium regulates the landlords  
23 “use of their land by regulating the relationship between landlord and tenant.” *Yee*,  
24 503 U.S. at 528. Based on the undisturbed precedent of *Yee*, limitations on how a  
25 landlord may treat tenants—which they have voluntarily invited onto their  
26 properties by renting to them—and enforce their contractual rights (for a temporary  
27 period) are readily distinguishable from regulations granting a *separate right* to  
28 invade property closed to the public or most individuals. *Id.* at 527–28, 531.

1 Second, central to the U.S. Supreme Court’s decision in *Yee* and as already noted,  
2 Plaintiffs voluntarily invited tenants onto their properties. *Id.* at 531 (“Because they  
3 voluntarily open their property to occupation by others, petitioners cannot assert a  
4 *per se* right to compensation based on their inability to exclude particular  
5 individuals.”), 527 (“Petitioners voluntarily rented their land to mobile home  
6 owners.”), 528 (“Petitioners’ tenants were invited by petitioners, not forced upon  
7 them by the government.”). Plaintiffs’ tenants were invited by themselves, not  
8 forced upon them by the government. *Id.* at 528. *Cedar Point Nursery* does not  
9 overrule *Yee* or undermine the legal underpinnings of *Yee*. Indeed, in *Cedar Point*  
10 *Nursery*, the Court cited *Yee* for general takings principles, and *Yee*’s holding is  
11 still binding law on this Court.

12 While *Cedar Point Nursery* announced that a non-continuous, intermittent  
13 easement created by California’s access regulation affected a *per se* physical  
14 taking, it did not undermine or disturb the long-standing principle that “[t]he  
15 government effects a physical taking only where it requires the landowner to  
16 submit to the physical occupation of his land.” *Yee*, 503 U.S. at 527. Because the  
17 moratorium does not commit a physical appropriation of Plaintiffs’ land beyond  
18 that consented by Plaintiffs in renting their units as residential properties—an  
19 industry heavily regulated by the State of Washington—the eviction moratorium  
20 does not constitute a *per se* taking under the Fifth Amendment. *See S. Cal. Rental*  
21 *Housing Ass’n v. Cnty. of San Diego*, No. 3:21-CV-912-L-DEB, 2021 WL  
22 3171919, at \*8 (S.D. Cal. July 26, 2021) (distinguishing *Cedar Point Nursery* and  
23 holding that plaintiff failed to show a likelihood of success on the merits on its  
24 Takings Clause claim challenging California’s eviction moratorium).

25 Plaintiffs’ argument that the eviction moratorium effects a taking in their  
26 rental contracts also fails. Plaintiffs cite regulatory takings case *Cienega Gardens*  
27 *v. United States*, (Fed. Cir. 2003) for their contention that the moratorium’s impact  
28 on their contracts constitutes a *per se* taking. Such is an inapplicable framework for



1 Plaintiffs’ physical takings claim, as it is inappropriate for this Court to “treat cases  
2 involving physical takings as controlling precedents for the evaluation of a claim  
3 that there has been a ‘regulatory taking,’ and vice versa.” *Tahoe-Sierra Pres.  
4 Council, Inc.*, 535 U.S. at 322. Plaintiffs also cite eminent domain case *United  
5 States v. Petty Motor Company*, 327 U.S. 372 (1946). *Petty Motor Company* is  
6 unpersuasive because it is not factually analogous and involves physical  
7 occupation. In that case, the United States physically appropriated a property  
8 owner and tenant’s leaseholds, requiring that the defendants submit their real  
9 property to the government’s immediate possession. *Id.* at 374–75. Here, the  
10 eviction moratorium does not eliminate or relinquish a contractual right of  
11 Plaintiffs; indeed, the moratorium did not diminish a single tenant’s debt obligation  
12 to Plaintiffs by even a penny. Plaintiffs’ arguments on this point are not supported  
13 by law and are of no avail.

14 For a similar reason, the eviction moratorium does not take Plaintiffs’  
15 property interests in security deposits. Plaintiffs claim that by limiting available  
16 uses of the security deposit during the period of emergency to prevent deductions  
17 for past-due rent, Washington has committed a *per se* taking of its property interest  
18 in their tenants’ security deposits. *See* ECF No. 22 at 12 (also arguing that the  
19 purpose of a security deposit is to reimburse landlords for unpaid rent at end of  
20 tenancy). The cases cited by Plaintiffs on this point concern actual confiscation of  
21 property by the government and are inapposite. *See, e.g., Brown v. Legal Found. of  
22 Wash.*, 538 U.S. 216, 240 (2003) (holding that interest on interpleaded funds  
23 exacted by the government could be a *per se* taking); *Webb’s Fabulous  
24 Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (holding that  
25 confiscation of interest on client funds deposited into lawyers’ trust accounts was a  
26 *per se* taking). As previously stated, the eviction moratorium does not extinguish  
27 Plaintiffs’ property interest in collecting unpaid rent whatsoever. Plaintiffs also  
28 remain able to deduct charges from security deposits for other tenant violations of

1 the Residential Landlord-Tenant Act, subject to state’s accounting requirements.  
2 Wash. Rev. Code § 59.18.280. This contention is particularly unpersuasive because  
3 Plaintiffs can recover any amount they would otherwise deduct from a tenant’s  
4 security deposit for unpaid rent by pursuing debt enforcement in accordance with  
5 the terms of the Bridge Proclamation and SB 5160. Washington is permitted to  
6 modify permissible uses of security deposits under its regulatory scheme, as it has  
7 done here, and it does not amount to a *per se* taking under the Fifth Amendment.

8 For the foregoing reasons, Plaintiffs’ Fifth Amendment claim fails as a  
9 matter of law. The Court grants summary judgment in favor of Defendants.

10 **D. Fourth Cause of Action: Due Process Clause of the Fourteenth**  
11 **Amendment to the U.S. Constitution**

12 Plaintiffs’ final claim asserts two distinct arguments under the Due Process  
13 Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs contend  
14 that the eviction moratorium violates the Due Process Clause because it is (1)  
15 unconstitutionally vague; and (2) “unduly oppressive” and thereby violative of  
16 substantive due process. ECF No. 22 at 32.

17 First, Plaintiffs argue that the eviction moratorium is impermissibly vague  
18 because it does not provide guidance as to how a landlord or property manager  
19 may construct a “reasonable payment plan” that is based on a tenant’s individual  
20 financial, health, or other circumstances. Plaintiffs Jay Glenn and Enrique Jevons  
21 submitted declarations indicating that they have managed to create repayment  
22 plans with several tenants. ECF No. 37-1 at 3–4; ECF No. 37-2 at 2–3. Plaintiff  
23 Jevons stated that, previously, he had not attempted to even inquire about  
24 individual tenants’ circumstances because it seemed “devious” on his part. ECF  
25 No. 37-2 at 2. The core of Plaintiffs’ vagueness grievance is that they experience  
26 difficulty ascertaining individual tenants’ financial or health circumstances, in part  
27 because tenants are not required to communicate with them. *Id.* at 2–3.

1 Defendants assert that the void for vagueness doctrine does not apply  
2 because due process only prohibits impermissibly vague laws with civil and  
3 criminal penalties. *See* ECF No. 30 at 59. Nonetheless, they further argue that the  
4 eviction moratorium’s repayment plan provision provides constitutionally  
5 permissible “flexibility and reasonable breadth” to courts, and that its terms  
6 provide “fair notice” of what is expected of Plaintiffs. *Id.* at 60 (citations omitted).

7 Second, Plaintiffs assert that that the eviction moratorium is unduly  
8 oppressive of “Plaintiffs’ right to determine the conditions upon which a person  
9 may continue to occupy the owner’s property.” ECF No. 22 at 34–35. They  
10 contend that they are “unjustifiably prevented from being able to rightfully use  
11 their properties and mitigate damages where tenants fail to pay rent.” *Id.* at 37.

12 Defendants respond that Plaintiffs are barred from repackaging their Takings  
13 Clause and Contracts Clause claims into a substantive Due Process Clause claim  
14 because the former provide explicit textual sources of constitutional protection of  
15 the asserted rights. ECF No. 30 at 60–61. In addition, Defendants claim that  
16 Plaintiffs’ substantive due process claim should not be analyzed under a  
17 heightened standard of scrutiny, as the challenge is based on Plaintiffs’ economic  
18 interests. *See* ECF No. 30 at 57. Under the appropriate standard, they argue, the  
19 moratorium is not arbitrary or irrational for the same reasons it furthers a  
20 significant and legitimate public purpose. *Id.* at 58.

21 1. Whether the Eviction Moratorium is Unconstitutionally Vague

22 a. *Legal Standard*

23 The Due Process Clause of the Fourteenth Amendment provides that “[n]o  
24 State shall . . . deprive any person of life, liberty, or property, without due process  
25 of law[.]” U.S. Const. amend XIV. “It is a basic principle of due process that an  
26 enactment is void for vagueness if its *prohibitions* are not clearly defined.” *City of*  
27 *Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289–90 (1982) (quoting *Grayned*  
28 *v. City of Rockford*, 408 U.S. 104, 108 (1972) (emphasis added)). For example, a

1 conviction fails to comport with due process when the statute under which it is  
2 obtained “fails to provide a person of ordinary intelligence fair notice of what is  
3 *prohibited*, or is so standardless that it authorizes or encourages seriously  
4 discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008)  
5 (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)) (emphasis added). Where the  
6 law “implicates First Amendment rights, . . . a ‘more demanding’ standard of  
7 scrutiny applies.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011)  
8 (quoting *Grayned*, 408 U.S. at 108). But “perfect clarity and precise guidance have  
9 never been required even of regulations that restrict expressive activity.” *Id.*  
10 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

11 A statute may be challenged as unconstitutionally vague on its face or as  
12 applied to a particular party. *See United States v. Kilbride*, 584 F.3d 1240, 1256–59  
13 (9th Cir. 2009). “Outside the First Amendment context, a plaintiff alleging facial  
14 vagueness must show that the enactment is impermissibly vague in all its  
15 applications.” *Humanitarian Law Project v. U.S. Treasury Dep’t*, 578 F.3d 1133,  
16 1146 (9th Cir. 2009); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987)  
17 (holding that a plaintiff mounting a facial challenge must establish that “no set of  
18 circumstances exists under [ ] the Act [that] would be valid”). Since a plaintiff  
19 mounting a facial attack to a statute must show that the law is impermissible in all  
20 its applications, a plaintiff must first show that the law is unconstitutionally vague  
21 as applied to them. *Castro v. Terhune*, 712 F.3d 1304, 1311 (9th Cir. 2013).

22 b. *Discussion*

23 Under the Bridge Proclamation, for rent owed that accrued on or after  
24 February 29, 2020 through September 30, 2021, a landlord is prohibited from  
25 treating unpaid rent as an enforceable debt if the landlord “has made no attempt to  
26 establish a reasonable repayment plan with the tenant per E2SSB 5160, or if they  
27 cannot agree on a plan and no local eviction resolution pilot program per E2SSB  
28 5160 exists.” Proc. 21-09, ¶ 42. Further, a landlord is required to offer a tenant a

1 “reasonable repayment plan” for rent accrued between August 1, 2021 and  
2 September 30, 2021 prior to enforcing any eviction notice pursuant to the order  
3 and Section 4 of SB 5160. *Id.* at ¶ 37. The Bridge Proclamation states that a  
4 “reasonable repayment plan” has the same meaning as “reasonable schedule for  
5 repayment” as defined under Section 4 of SB 5160. *Id.* at 43. More specifically, it  
6 refers to a “repayment plan or schedule for unpaid rent that does not exceed  
7 monthly payments equal to one-third of the monthly rental charges during the  
8 period of accrued debt.” *Id.*

9 Under the previously effective Proclamation 20-19.6, the eviction  
10 moratorium applied for all unpaid rent accruing on or after February 29, 2020.  
11 Proc. 20-19.6, ¶ 35. A landlord or property manager could not treat any unpaid rent  
12 as an enforceable debt if it accrued after this point as a result of the COVID-19  
13 pandemic. *Id.* That prohibition was caveated with the following provision:

14 This prohibition does not apply to a landlord, property owner, or  
15 property manager who demonstrates by a preponderance of the  
16 evidence to a court that the resident was offered, and refused or failed  
17 to comply with, *a re-payment plan that was reasonable based on the*  
18 *individual financial, health, and other circumstances of that resident;*  
failure to provide a reasonable repayment plan shall be a defense to  
any lawsuit or other attempts to collect.

19 *Id.* (emphasis added). At the time, the Washington State Attorney General’s Office  
20 prepared assistive materials, including an unpaid rent repayment plan worksheet, to  
21 assist landlords and property managers in communicating with tenants to establish  
22 such repayment plans.

23 In this case, the Court finds the eviction moratorium is not impermissibly  
24 vague and does not violate the void for vagueness doctrine. Plaintiffs’ due process  
25 claim fails outright because the contested provision is not a prohibition and does  
26 not require them to do anything. *See Grayned*, 408 U.S. at 108 (“It is a basic  
27 principle of due process that an enactment is void for vagueness if its *prohibitions*  
28 are not clearly defined.”) (emphasis added). The moratorium’s actual prohibition is

1 indisputably clear: landlords and property managers may not treat unpaid rent  
2 stemming from the COVID-19 pandemic as an enforceable debt during the state of  
3 emergency. Plaintiffs’ complaint concerns the exception to the prohibition, which  
4 the state constructed to *permit* enforcement proceedings in narrow circumstances:  
5 that is, where a landlord and tenant have established a repayment plan that was  
6 “reasonable based on the individual financial, health, and other circumstances of  
7 that resident.” Proc. 20-19.6, ¶ 35; *see also* Proc. 21-09, ¶¶ 42–45. This provision,  
8 which permits rather than prohibits a particular remedy, is not properly challenged  
9 under the vagueness doctrine.

10 Further, even if this exception constituted a “prohibition” and fell within the  
11 scope of the vagueness doctrine, the moratorium is not vague as applied to  
12 Plaintiffs. Plaintiffs have failed to demonstrate that the eviction moratorium in  
13 either its previous or current form is impermissibly vague as applied to them.<sup>4</sup>  
14 Plaintiffs’ vagueness claim is directly undermined by the fact that at least two  
15 Plaintiffs have managed to create repayment plans with tenants. During  
16 implementation of the former moratoria, which provides slightly less substantive  
17 guidance on establishing repayment plans, Plaintiff Jay Glenn attested that, for  
18 example, one tenant owed \$3,000 in past-due rent and offered to pay \$120 per  
19 month after moveout, which he accepted as reasonable. And under the operative  
20 Bridge Proclamation, such a plan is *plainly* reasonable if the schedule does not  
21 “exceed monthly payments equal to one-third of the monthly rental charges during  
22 the period of accrued debt.” Proc. 21-09, ¶ 43. Provided that a devised schedule  
23 does not exceed this threshold, landlord and property managers may seek  
24 reimbursement if a tenant defaults under the repayment plan. Because of this, the  
25 Court cannot find that the repayment plan provision does not provide a person of  
26

27 <sup>4</sup> Plaintiffs do not contend that their First Amendment rights are implicated, and  
28 therefore heightened scrutiny does not apply.

1 ordinary intelligence fair notice of what is permitted (or prohibited) or that it  
2 encourages seriously discriminatory enforcement. *See Williams*, 553 U.S. at 34.  
3 Plaintiffs have failed to demonstrate that there is no set of circumstances where the  
4 law as applied would be valid, and their facial attack is unsuccessful. *See Salerno*,  
5 481 U.S. at 745; *Castro*, 712 F.3d at 1311. Accordingly, Plaintiffs’ claim that the  
6 eviction moratorium is unconstitutionally vague fails as a matter of law, and  
7 summary judgment on this claim is granted to Defendants.

8 2. Whether the Eviction Moratorium Violates Plaintiffs’ Substantive Due  
9 Process Rights

10 a. *Legal Standard*

11 The right to use property as one wishes is not a fundamental right under  
12 substantive due process, as it is economic in nature. *Slidewaters LLC v.*  
13 *Washington State Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021); *Bowers*  
14 *v. Whitman*, 671 F.3d 905, 915–17 (9th Cir. 2012). “The proper test for judging the  
15 constitutionality of statutes regulating economic activity . . . is whether the  
16 legislation bears a rational relationship to a legitimate state interest.” *Jackson*  
17 *Water Works, Inc. v. Pub. Util. Comm’n of Cal.*, 793 F.2d 1090, 1093–94 (9th Cir.  
18 1986). “Legislative acts that do not impinge on fundamental rights or employ  
19 suspect classifications are presumed valid, and this presumption is overcome only  
20 by a ‘clear showing of arbitrariness and irrationality.’” *Slidewaters LLC*, F.4th at  
21 758 (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.  
22 1994)). The U.S. Supreme Court has “long eschewed” a heightened standard of  
23 scrutiny when addressing substantive due process challenges by government  
24 regulation. *Lingle*, 544 U.S. at 542; *see also Ferguson v. Skrupa*, 372 U.S. 726,  
25 730 (1963) (“We have returned to the original constitutional proposition [pre-  
26 *Lochner*] that courts do not substitute their social and economic beliefs for the  
27 judgment of legislative bodies, who are elected to pass laws.”). Instead, federal  
28

1 courts must defer “to legislative judgments about the need for, and likely  
2 effectiveness of, regulatory actions.” *Lingle*, 544 U.S. at 545.

3 Accordingly, to determine whether the eviction moratorium violates  
4 Plaintiffs’ substantive due process rights, the Court must first determine whether  
5 the law could advance any legitimate government purpose. *Kawaoka v. City of*  
6 *Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994). Second, the Court must  
7 determine whether the law is arbitrary and irrational. *See Lingle*, 544 U.S. at 542;  
8 *Slidewaters LLC*, 4 F.4th at 758. This is akin to a rational basis standard of review,  
9 *see Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124–25 (1978), and is a “less  
10 searching” standard than that utilized in a constitutional challenge under the  
11 Contracts Clause, *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717,  
12 733 (1984).

13 Furthermore, the U.S. Supreme Court has made clear that a substantive due  
14 process claim must give way to a claim based on identical facts that is derived  
15 from “an explicit textual source of constitutional protection.” *Graham v. Connor*,  
16 490 U.S. 386, 395 (1989); *Albright v. Oliver*, 510 U.S. 266, 266, 273 (1994) (four-  
17 Justice plurality), *id.* at 281 (Kennedy, J., concurring); *Stop the Beach*  
18 *Renourishment, Inc.*, 560 U.S. at 721 (Kennedy, J., concurring).

19 b. *Discussion*

20 In this case, the Court finds that Plaintiffs’ Contracts Clause claim  
21 supersedes their substantive Due Process Clause claim. Plaintiffs’ substantive due  
22 process claim is identical to their cause of action under the Contracts Clause,  
23 which the Court has already adjudicated. The Contracts Clause provides “an  
24 explicit textual source of constitutional protection” and Plaintiffs may not  
25 repackage their identical argument into an independent due process claim. *See*  
26 *Graham*, 490 U.S. at 395.

27 Further, Plaintiffs’ property-based substantive due process claim employs a  
28 lower standard of scrutiny than that employed under their Contracts Clause claim.



1 The Court already determined that, under Contracts Clause analysis, the eviction  
2 moratorium is an appropriate and reasonable fit to a significant and legitimate  
3 purpose of the state. The moratorium is not unduly oppressive to Plaintiffs’ due  
4 process rights or arbitrary and irrational for the same reasons it is an “appropriate”  
5 and “reasonable” regulation under the Contracts Clause. *Accord Blaisdell*, 290  
6 U.S. at 448. As a result, the Court grants summary judgment to Defendants on  
7 Plaintiffs’ substantive due process claim.

## 8 V. Conclusion

9 For the foregoing reasons, this Court holds that the Washington’s eviction  
10 moratorium does not violate the Takings Clause, Contracts Clause, or Due Process  
11 Clause of the U.S. Constitution. The state government can, should, and must  
12 protect the public’s health and safety during a pandemic to mitigate transmission of  
13 a novel and potentially fatal pathogen, as the State of Washington has done in the  
14 past nineteen months to combat the COVID-19 pandemic. The people of  
15 Washington, all of us collectively, can, should, and must protect ourselves, but also  
16 one another, during the pandemic. This worthy objective includes protecting the  
17 most vulnerable individuals in our state. The eviction moratorium is part of the  
18 emergency efforts implemented by the duly elected governor of the State of  
19 Washington, whose role is to exercise his powers and responsibilities to protect the  
20 people from the COVID-19 pandemic and protect the economy of the state. These  
21 aims were appropriately realized through implementation of Washington’s eviction  
22 moratorium.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendants' Cross-Motion for Summary Judgment, ECF No. 30, is  
3 **GRANTED.**

4 2. Plaintiffs' Motion for Summary Judgment, ECF No. 22, is **DENIED.**

5 3. The District Court Executive is directed to enter judgment in favor of  
6 Defendants and against Plaintiffs.

7 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
8 this Order, provide copies to counsel, and **CLOSE** the file.

9 **DATED** this 20th day of September 2021.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

15 Stanley A. Bastian  
16 Chief United States District Judge  
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